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JOSEPH F. SPANIOLO, JR.
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IN THE
Supreme Court of the United

October Term, 1986

CORINA ANN GONZALES, individually and as spouse
of Abenicio Gonzales, deceased; individually and as
personal representative of the Estate of Abenicio Gonzales,
deceased; and as guardian of Randall Gonzales, Minor;
RICARDO GONZALES; MERLINDA GONZALES;
ROSALIND GONZALES, heirs at law of the deceased,
and the Estate of Abenicio Gonzales,

Petitioners,

v.

ROGER SEALY and THE CITY AND COUNTY OF
DENVER,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN SUPPORT

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QUESTIONS PRESENTED

1. Whether a person possesses a constitutionally protected right to a continuing relationship with his parent or spouse.
2. Assuming *arguendo* that such a constitutional right exists, whether a surviving family member states a claim pursuant to 42 U.S.C. § 1983 for deprivation of such right without alleging that the state actor intended to interfere with that particular relationship in causing the death of the family member.

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Respondents concur that a writ of certiorari should
issue, but on different grounds.

COUNTER-STATEMENT OF THE CASE

On August 9, 1981, Respondent Roger Sealy, while on
routine patrol as an officer of the Denver, Colorado, Police
Department, encountered the decedent, Abenicio Gonzales,
after observing the vehicle in which Gonzales occupied the
driver's seat parked outside a bar with its lights on after the
bar had closed. When Officer Sealy ordered Gonzales to step
out of the car and to produce identification, Gonzales exited
his vehicle, reached to his rear, pulled a knife out of his rear

pocket and lunged at Officer Sealy who was standing approximately five feet away. Officer Sealy drew his service revolver and fired five times, killing Gonzales.

The deceased's surviving wife and four children each brought, *inter alia*, personal claims pursuant to 42 U.S.C. § 1983 contending that the shooting of the decedent deprived each of them of his or her own constitutionally protected right to a continuing relationship with the deceased. The district court granted Respondents' motion for summary judgment and dismissed such claims. The trial court held that based upon the admission of Petitioners that there was no evidence that Officer Sealy knew the decedent or Petitioners prior to his encounter with the decedent, Petitioners would be unable to meet their burden under *Trujillo v. Board of County Commissioners*, 768 F. 2d 1186 (10th Cir. 1985), that would have required proof that Officer Sealy in shooting the decedent did so with the intent to deprive Petitioners of their particular relationship with the decedent.

The trial court certified this issue for appeal pursuant to 28 U.S.C. § 1292 (b). Petitioners appealed the dismissal to the Tenth Circuit. Respondents filed a motion to affirm the judgment of the district court. Petitioners conceded that dismissal was proper under *Trujillo*, if *Trujillo* was properly decided. The Tenth Circuit granted the motion to affirm, declining to reevaluate its decision in *Trujillo*.

SUMMARY OF ARGUMENT

While the Tenth Circuit properly affirmed the dismissal of Petitioners' Section 1983 claims, to the degree *Trujillo* recognized a constitutional right to a continuing family relationship, its reliance on *Trujillo* was misplaced. There is a split among the federal circuit courts and state courts concerning whether a constitutional right to a continuing relationship exists. This Court has not addressed this issue to date. Four circuits have recognized some form of a constitutionally protected right to a family association, one of which held it exists for some family members but not for others. Another circuit and two state courts have held that no such right exists, which is the proper ruling. In the alternative, if such a constitutionally protected right is recognized, a Section 1983 claim premised on deprivation of such right must have logical and reasonable limitations as set forth in the Tenth Circuit's decision in *Trujillo*.

ARGUMENT

Review By This Court Is Required To Resolve A Conflict Among The Federal Circuit Courts And State Courts With Respect To Important And Recurring Federal Issues That Can Only Be Resolved By This Court.

This Court has never considered whether a family member has a constitutionally protected liberty interest in a continuing relationship with another family member. On two prior occasions where this Court did grant review, in *Jones v. Hildebrandt*, 191 Colo. 1, 550 P. 2d 339 (Colo. 1976), *cert. dismissed*, 432 U.S. 183 (1977); and *Espinoza v. O'Dell*, 633 P. 2d 455 (Colo. 1981), *cert. dismissed*, 456 U.S. 430 (1982), certiorari was dismissed after oral argument. In *Jones*, the petition was dismissed as improvidently granted, over a strong dissent by Justice White who was joined by Justices Brennan and Marshall, on the grounds of an apparent shift of strategy by plaintiff's counsel during oral argument with respect to an issue this Court concluded had not been directly addressed below. In *O'Dell*, this Court dismissed for want of jurisdiction because the state supreme court had remanded the case for trial, and therefore its decision was not "final." The absence of a decision from this Court on this issue has resulted in a split among the federal circuit courts and state courts regarding whether such a constitutional right exists and, if so, as to which family members. In addition, the courts have not agreed as to whether an allegation that the defendant intended to interfere with a particular relation is required.

The following circuit courts have held such a right to exist, although they differ as to the scope of such right: the Third Circuit in *Estate of Bailey v. County of York*, 768 F. 2d 503 (3d Cir. 1985), *cert. den. sub. nom. Estate of Gilmore v. Buckley*, _____ U.S. _____, 107 S. Ct. 270 (1986), recognized a parent's liberty interest in a continuing relationship with his child; the Seventh Circuit in *Bell v. City of Milwaukee*, 746 F. 2d 1205 (7th Cir. 1984), recognized a parent's liberty interest in the continued association with his children, but found that no such associational right existed for siblings; the Ninth Circuit in *Smith v. City of Fontana*, 807 F. 2d 796 (9th Cir. 1987), recognized a child's liberty interest in a continuing relationship with his parent; the Ninth Circuit in *Kelson v. City of Springfield*, 767 F. 2d 651 (9th Cir. 1985), recognized a parent's constitutional

right to the continued relationship with his child; and the Tenth Circuit in *Trujillo v. Board of County Commissioners*, 768 F. 2d 1186 (10th Cir. 1985), held that both a parent and a sibling have a constitutional right of freedom of intimate association with the family member, but required proof that the officer acted with the intent to interfere with that particular relationship.

In conflict with these decisions is the First Circuit in *Ortiz v. Burgos*, 807 F. 2d 6 (1st Cir. 1986), which held that parents and siblings do not have a constitutionally protected liberty interest in the companionship of their adult son and brother. See also *Ealey v. City of Detroit*, 144 Mich.App. 324, 375 N.W.2d 435 (1985), cert. den., _____ U.S. _____, 107 S. Ct. 401 (1986), holding that parents were deprived of no substantive civil right by the death of their child; and *Ascani v. Hughes*, 470 So. 2d 207 (La.App.), writ den. 472 So.2d 919, cert. den., _____ U.S. _____, 106 S. Ct. 517 (1985), holding that siblings have no First Amendment constitutionally protected liberty interest in the continued relationship with a brother.

It is clear that these issues, if left unresolved by this Court, will remain important and recurring ones for both federal and state courts throughout the country resulting in continuing conflicting decisions in such courts.

CONCLUSION

For these reasons, Respondents join Petitioners in urging that a writ of certiorari be issued.

Respectively submitted,

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